Suffolk County Council

Suffolk County Council (20050784)

Issue Specific Hearing 1 Post-Hearing Written Submission

North Falls (EN010119)

Deadline 4 **25 April 2025**

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Glossary of Acronyms

CEA	*Cumulative Effects Assessment*
DCO	*Development Consent Order*
DVAONB	*Dedham Vale Area of Outstanding Natural Beauty*
EACN	*East Anglia Connection Node*
ECC	*Essex County Council*
EIA	*Environmental Impact Assessment*
ExA	*Examining Authority*
ISH1	*Issue Specific Hearing 1*
LIR	*Local Impact Report*
LVIA	*Landscape and Visual Impact Assessment*
OCTMP	*Outline Construction Traffic Management Plan*
OnSS	*Onshore substation*
NH	*National Highways*
NSIP	*Nationally Significant Infrastructure Project*
SCHAONB	*Suffolk Coast and Heaths Area of Outstanding Natural Beauty*
SEP	*Skills and Employment Plan*
SO	*Special Order*

“SCC” refers to Suffolk County Council.

Purpose of this Submission

The purpose of this submission is to provide a written summary of representations made by Suffolk County Council ("SCC") at Issue Specific Hearing 1 ("ISH1") held on 2 and 3 April 2025. Examination Library references are used throughout to assist readers.

Item	Suffolk County Council's Summary of Oral Case and responses to questions	References
1	**Welcome, introductions, arrangements for the Hearing**	
	Suffolk County Council were represented by the following team in person: - Graham Gunby, National Infrastructure Planning Manager - Clara Peirson, Graduate Project Officer Attending colleagues were supported by the following team virtually: - Isolde Cutting, Senior Landscape Officer - Steve Merry, NSIP Highway Manager - Julia Cox, Senior Engineer (NSIPs & Projects) - James Chandler, Skills for Infrastructure Strategic Lead	
2	**Purpose of this Issue Specific Hearing**	
	SCC has no representations to make under Agenda Item 2.	

3	**Matters for discussion at this Hearing**	
3.1	**Landscape and visual impact and design**	
	3.1.a Whether the proposal would enable the Secretary of State to discharge the section 85 Countryside Rights of Way Act 2000 duty as amended by section 245(6) of the Levelling Up and Regeneration Act 2023. The Applicant must ensure that it is compliant with the duty, for onshore matters, regarding the impact of the onshore substation ("OnSS") on the Dedham Vale Area of Outstanding Natural Beauty ("DVAONB"). SCC has made detailed representations on this point in paragraphs 7.26 and 7.27 of its Local Impact Report ("LIR") [REP1-074] and in response to the Applicant's comments on SCC's LIR [REP3-068]. SCC has noted that there remain some unassessed zones of theoretical visibility in the DVAONB as a result of the OnSS, and so SCC considers that further viewpoints must be included in the Landscape and Visual Impact Assessment ("LVIA") to ensure that all theoretical zones of visual influence are assessed. The Applicant stated during ISH1 that these unassessed zones of theoretical visibility have been considered, and conclusions were reached that these areas would also only see 'glimpses' of the development and so detailed assessments were not warranted. The Examining Authority ("ExA") requested that the Applicant provide evidence at Deadline 4 of how these zones have been considered in the LVIA. SCC welcomes this, and will review the Applicant's Deadline 4 submissions and make any comments it considers necessary at Deadline 5. If the proposed development has some visual impact on the DVAONB, SCC considers that the Applicant must undertake measures which seek to conserve and enhance the purposes of the designation of the DVAONB proportionate to the level of effect found. SCC considers that, with regards to the active duty, not only significant impacts in Environmental Impact Assessment ("EIA") terms need to be considered, but all residual impacts and effects. SCC has detailed this position in its Deadline 2 submission [REP2-059].	

	SCC also noted its disagreement with the Applicant's assessment of the low level of visibility of the OnSS from the DVAONB resulting in no impacts on the DVAONB. Although the Applicant considers that the OnSS would only ever be, at most, "glimpsed" from the DVAONB, there are likely to be sequential impacts due to these 'glimpses' being visible from multiple locations within the DVAONB, and the presence of power lines leading to the OnSS would draw the eye to the OnSS. Additionally, the addition of 'industrial' elements (i.e. the OnSS) would result in a distinct change in character to the setting of the National Landscape. SCC therefore considers that the OnSS would have an effect on the DVAONB. Appendix A to this submission is SCC's Representation on the duty which was submitted to the Five Estuaries Offshore Wind Farm Examination, and Appendix B is SCC's response to submissions made by the Five Estuaries Applicant at Deadline 6 of that Examination in relation to that Applicant's stance on the duty. These appendices provide further details of SCC's interpretation of the duty and its application to the Five Estuaries Offshore Wind Farm project. SCC notes that references are made in these documents to the Five Estuaries Offshore Wind Farm Applicant's Seascape, Landscape and Visual Impact Assessment and the views of the respective Applicant on the duty presented during the Five Estuaries Examination. The comments made by SCC in Appendices A and B are not, therefore, all relevant and applicable to the North Falls project. However, due to the similarities between the projects and by extension the application of the duty, SCC considers many of the points made in these representations to be relevant to the North Falls examination. Additionally, the focus of these submissions was on the impacts of the wind turbine generators on the Suffolk Coast and Heaths Area of Outstanding Natural Beauty ("SCHAONB"), rather than the impacts of the OnSS on the DVAONB. **3.1.b Whether the impacts on visual amenity during construction and operation have been adequately assessed.** SCC wishes to reiterate its views outlined above that a more thorough assessment of the zones of theoretical visibility within the DVAONB are required. SCC will review the information	

	submitted by the Applicant at Deadline 4 in relation to this matter, and will respond at Deadline 5 where appropriate. **3.1.c Whether Natural England's representations and issues log in REP3-064 at Appendix I - Seascape, Landscape and Visual Impact Assessment, which suggests that a revised assessment is required, have been addressed. This includes whether or not the impacts on visual amenity during construction and operation have been adequately assessed.** SCC has no representations to make under Agenda Item 3.1(c). **3.1.d Whether, or not, the Applicant has coordinated the design of the proposed onshore substation (OnSS) with the proposed Five Estuaries Offshore Windfarm (VEOWF) substation. If coordinated, how this would progress?** SCC has no representations to make under Agenda Item 3.1(d). **3.1.e What would be the effect of nighttime lighting at the proposed OnSS both alone, and cumulatively with other proposals nearby?** As the OnSS is located within Essex, SCC defers this issue largely to Essex councils. In respect of effects of nighttime lighting on the DVAONB, SCC welcomes the Design Vision Principles in the Design Vision (Section 7.11, [APP-234]) and the reference made to the Lighting Design Guide for Dedham Vale National Landscape & Coast & Heaths National Landscape. SCC welcomes the commitment by the Applicant in Section 1.3.9 of the Outline Code of Construction Practice ("CoCP") ([REP3-017]) to manage emissions from artificial light during construction in accordance with Bats and Artificial Lighting at Night guidance (Bat Conservation Trust and Institute of Lighting Engineers, 2023). SCC considers that this should also apply to lighting during the operational period.	

	SCC considers that Requirement 5 of the Development Consent Order ("DCO") should not only include operational external lighting, but that lighting arrangements during construction should also be agreed. **3.1.f Whether the proposed mitigation at the OnSS of the Proposed Development would provide adequate visual screening, and how would this relate to the VEOWF proposed development visual screening.** SCC has no representations to make under Agenda Item 3.1(f).	
3.2 Historic heritage		
	3.2.a Whether the adverse effects on buried archaeological assets would be effectively mitigated through the proposed mitigation. **3.2.b Whether the effects on Conservation Areas and Heritage Assets have been adequately assessed** **3.2.c Whether the proposed mitigation for the Conservation Areas and Heritage Assets would be sufficient, and whether there would be a need for additional mitigation?** **3.2.d Whether the proposed offshore cable corridor from the proposed development would adversely affect sediment and geoarchaeological potential.** **3.2.e Whether any amendments are required to the draft DCO requirements or associated Management Plans.** SCC has no representations to make under Agenda Item 3.2.	

3.3 Traffic and transportation		
	3.3.a Whether there are any onshore port and transportation impacts that would arise from the construction, operation and decommissioning of the offshore works. SCC acknowledges the Applicant's oral representation in relation to their view that a Port Traffic Management Plan is not necessary. SCC is content with the Applicant's stance and the reasoning it has provided and does not intend to pursue its request for a Port Traffic Management Plan. SCC will ensure its updated views on this matter are accurately reflected in its Statement of Common Ground with the Applicant. SCC would still recommend a Port Travel Plan or similar document to provide guidance on how the project can maximise the use of sustainable transport by workers travelling to or from ports during construction of the offshore works in compliance with EN-1. **3.3.b Whether the proposed mitigation to limit Heavy Goods Vehicle numbers would be sufficiently robust, precise and enforceable, or whether provision should be made for any additional mitigation measures.** SCC has no representations to make under Agenda Item 3.3(b). **3.3.c Whether the personnel travel measures identified in the outline construction traffic management plan would be sufficiently robust, precise and enforceable to support the assumptions for single occupancy vehicle trips.** SCC has no representations to make under Agenda Item 3.3(c). **3.3.d Whether the mitigation would be adequate for the outstanding risks associated with the Abnormal Indivisible Loads proposals.**	

	SCC welcomes the Applicant's provision of an Abnormal Indivisible Load Access Report [REP1-008] which identifies a route from Harwich to the site accesses and that this is secured for all AILs other than Special Order ("SO") movements in the Outline Construction Traffic Management Plan ("OCTMP") [REP3-022]. As this route does not enter Suffolk the authority would defer to Essex County Council ("ECC") and National Highways ("NH") on this matter. A critical matter for SCC is that if Special Order movements are required from the West Dock in the Port of Ipswich, they would travel down the A137 across Ostrich Creek Bridge, which is subject to a weight restriction. Any movements heavier than the weight limit require an overbridge, resulting in closure of the road for approximately 24 hours. SCC also welcomes the revised wording provided in Paragraph 43 of the OCTMP [REP3-022], which will require the Applicant to consult SCC if loads are to travel through Suffolk. However, SCC notes that ESDAL is a booking system, and it does not assess any impacts associated with the movements. The notice period for an ESDAL application is five days, and this is far from being a sufficient amount of time for the necessary investigations, commissioning and road space booking to be conducted. Highways authorities can, and do, refuse to accept movements if there is a problem with a structure, which is an issue that SCC has experienced with movements to and from Sizewell C in recent weeks. SCC therefore proposes the following amendments to the wording of Paragraph 43 of the OCTMP: *The PC will consult with Essex Police, relevant highway authorities and Network Rail in advance of any ESDAL notification to agree appropriate timings, routes and asset protection measures (with the relevant highway authorities, police and Network Rail as relevant) appropriate to the type of load. This process will be followed for all administration areas through which the loads will traverse, and feed into the formal ESDAL application which will be submitted by the TMCo.*	

	This would then allow sufficient time for any review, inspection and assessment of highway structures both for special movement orders and non-special movement order AILs. As ESDAL is a separate process, any impacts associated with special order movements are not assessed or controlled in the Application.	
3.4	**Noise and any other health impacts**	
	3.4.a For construction, whether the proposed mitigation measures for noise and vibration are sufficient, well defined and secured in the draft DCO. **3.4.b For the substation operation, how sufficient good design measures have been incorporated to reduce and mitigate noise effects.** **3.4.c Position relating to Electro-Magnetic Fields.** SCC has no representations to make under Agenda Item 3.4.	
3.5	**Agriculture, ground conditions and soils**	
	3.5.a The use of BMV land and the long-term effects on agricultural land classification. **3.5.b Restoration and reinstatement of soils.** **3.5.c The temporary and permanent effects on agricultural activities.** **3.5.d The width of the cable corridor and depth of the cables.** SCC has no representations to make under Agenda Item 3.5.	

3.6	**Flood risk, groundwater and surface water**	
	3.6.a **Whether the proposed development has adequately taken account of those residents whose water supply is only guaranteed through well water supply.** **3.6.b** **Disapplication of environmental permits for abstraction and dewatering activity: whether or not an abstraction license or exemption is in fact required.** **3.6.c** **Whether the Applicant's position regarding a post-consent FRA is considered best practice.** **3.6.d** **The extent to which the Flood Risk Assessment provided post-consent would adequately assess the risk to third parties and allow for consideration of mitigation in the decision-making process.** **3.6.e** **Whether sufficient coordination of landfall flood defence impact has been progressed with the VEOWF.** **3.6.f** **Construction related impacts and flood risk: whether or not the position of the Environment Agency regarding the Code of Construction Practice, and trenched crossings and haul road crossings using HDD has been addressed.** SCC has no representations to make under Agenda Item 3.6.	
3.7	**Socio-economic effects**	
	3.7.a **What support would be given to the local population to access the employment opportunities that are anticipated and to ensure that the employment benefits are realised for the local area.**	

	SCC is supportive of the engagement, research-led approach proposed by the Applicant, and agrees that collaborative commitments are vital. SCC considers the suggested activity within the themes of the Skills and Employment Plan ("SEP"), including outreach activity to support Suffolk's hardest to reach groups, and education and inspiration content for schools, essential. SCC requests that binding provisions are considered in the DCO to secure the delivery of a co-produced and co-governed SEP, to improve accountability and transparency on these socio-economic matters. Through the newly established Regional Skills Co-ordination Function, SCC is able to help resource and address these challenges and opportunities. SCC is therefore able to assist in, and would expect, co-development of the SEP. This would include governance arrangements to oversee the delivery and adaptation of the SEP to be able to respond to new information and changes in socio-economic conditions. SCC considers that greater clarity is needed regarding role types and their quantity over the duration of the project lifecycle, split by phase. This would help to provide more information regarding how the spectrum of roles will be accessed by local people in a strategic manner that goes beyond workforce recruitment drives. Although these are fundamental, the significant competition created by multiple nationally significant infrastructure projects ("NSIPs") competing for the same labour market must also be addressed. Although the Applicant acknowledges these tightening labour market conditions, an indication of potential mitigation strategies is required within the SEP. With the appropriate governance arrangements, this could be overseen by the Applicant and the local authorities affected by this matter. The Applicant requested that SCC specify what drafting changes it would like to see in the OSEP. SCC has provided the changes to the drafting it would like to see in its 'Response to action points arising from Issue Specific Hearings 1 & 2' submission at Deadline 4.	

	3.7.b Whether proposals can be taken forward to ensure that local supply chains benefit from the proposed development. SCC expects the Applicant to support the delivery of SCC's inclusive growth agenda. SCC considers that this can be achieved through: 1) Sharing of information in relation to contracts to be won as far in advance as possible, allowing local supply chains to make the necessary adjustments to their own organisations in order to be in a position to win work. 2) More coordinated efforts with other NSIPs that will be looking to procure similar contracts, creating a clear pipeline of activity for local companies to understand 3) In order to accurately assess the local supply chain, the capabilities of local companies to actually win work must also be assessed, not merely the number of businesses in that sector. This would also allow issues to be identified and programmes to be developed by SCC, either alone or with other partners, to allow local companies to address these problems and put them in a better position to win work. SCC would be happy to work with the Applicant in relation to this matter. **3.7.c What, if any, community benefits are proposed and how would these be secured.** SCC has no representations to make under Agenda Item 3.7(c).	
3.8 Cumulative effects		
	3.8.a Whether the proposed development should include provision for additional mitigation for cumulative noise effects from construction traffic, and if so, how would that be secured. SCC has no representations to make under Agenda Item 3.8(a).	

	3.8.b For the substation operation, whether sufficient good design measures have been incorporated to reduce and mitigate noise effects. SCC has no representations to make under Agenda Item 3.8(b). **3.8.c Whether the cumulative impact on archaeology with the cable corridor associated with VEOWF has been adequately assessed.** SCC has no representations to make under Agenda Item 3.8(c). **3.8.d The adequacy of the cumulative effects assessment (CEA) in relation to the consideration of the proposed development together with the VEOWF and the Norwich to Tilbury and other development projects.** SCC has made points in this respect in Paragraphs 7.24 to 7.27 of its LIR [REP1-074] and in its response to the Applicant's comments on SCC's LIR [REP3-068]. SCC considers Tarchon should have been included within the Cumulative Effects Assessment ("CEA"), as it is a reasonably foreseeable project given that it has a connection offer from National Grid at the East Anglia Connection Node ("EACN") and has started non-statutory consultation. Tarchon's converter station will be 10m+ taller than the substations of Five Estuaries and North Falls (around 26m) and so could contribute greatly to cumulative effects on the DVAONB. With regards to Landscape and Visual Impact Assessment, neither the original CEA (in Document 3.1.32 Environmental Statement Chapter 30 Landscape and Visual Impact Assessment [APP-044]) nor the CEA Summary ([REP3-042]) have addressed the specific potential cumulative impacts and effects of the Tarchon project and Norwich to Tilbury powerline pylons on the special qualities of, and views from, the DVAONB. As noted under Agenda Item 3.1, the Norwich to Tilbury power lines lead the eye to the OnSS, further increasing this cumulative effect. The Applicant should ensure that all of these projects are fully assessed in combination with North Falls' OnSS in the CEA.	

	With regards to the projects that have been included in the CEA assessment [APP-044], the Applicant does not consider that, holistically, further mitigation measures would be necessary, nor any coordinated landscape restoration as suggested by the Design Council, despite identifying potentially significant adverse cumulative effects. As the infrastructure in question is not within Suffolk, SCC defers to the relevant local authorities, but does express its concern with regards to the DVAONB. SCC considers that to date the potential cumulative effects have not been fully addressed and that further mitigation may be necessary to discharge the strengthened duty. SCC acknowledges the Applicant's need to balance landscape mitigation against other receptors that may be adversely affected by such mitigation, but SCC considers this cannot be used as an excuse to not consider landscape restoration proposals for the wider area.	
3.9 Co-ordination and alternatives		
	3.9.a Whether the applicant has fully explored, in co-ordination with other parties, the options for an integrated offshore connection in accordance with NPS policies. SCC has no representations to make under Agenda Item 3.9(a). **3.9.b Whether there is a viable alternative offshore option to an onshore radial connection that could deliver a connection for the proposed development within an appropriate timescale.** SCC has no representations to make under Agenda Item 3.9(b). **3.9.c Whether the application for the proposed development is premature given the stage that National Grid's Norwich to Tilbury project has reached in the development consent process.** Given the reliance of this project on the consent of the Norwich to Tilbury project and the potential impacts on the SCHAONB of North Falls Offshore Wind Farm, SCC has recommended	

	for a phasing condition to be added to the DCO in paragraphs 7.28 to 7.30 of its LIR [REP1-074]. The Applicant did not respond to this point in its response to SCC's LIR. The wording of the condition in the proposed requirement means that only the offshore turbine works are restricted in commencement until Norwich to Tilbury has consent to avoid unnecessary adverse impacts on the SCHAONB. As such works would take place towards the end of the project's construction phase, the Applicant is unlikely to be disadvantaged in its operations. Details of why SCC considers this requirement to meet the tests requirement of planning conditions and DCO requirements can be found in paragraph 7.30 of the LIR [REP1-074], and SCC has provided further detail in its Deadline 4 submission titled 'Response to action points arising from Issue Specific Hearings 1 & 2'. **3.9.d Whether the North Falls Offshore Wind Farm, the VEOWF, the Tarchon Interconnector and the Norwich to Tilbury projects should be examined as one application?** SCC has no representations to make under Agenda Item 3.9(d). **3.9.e The consideration of alternatives to the siting of the onshore sub-station having regard to the ultimate selection of the onshore substation site on Grade 1 Best and Most Versatile (BMV) agricultural land.** SCC has no representations to make under Agenda Item 3.9(e). **3.9.f Whether any greater degree of co-ordination between the applicant and the VEOWF project could be achieved in order to minimise the impact on farmland of the onshore substation and onshore cable route.** SCC has no representations to make under Agenda Item 3.9(f).	

4	**Any other matters**	
	SCC has no representations to make under Agenda Item 4.	
5	**Close of hearing**	
	SCC has no representations to make under Agenda Item 5.	
Close of ISH1		

Suffolk County Council

Suffolk County Council (20050784)

Appendix A: Representation on the duty in s.85(A1) of the Countryside and Rights of Way Act 2000 submitted to the Five Estuaries Examination

North Falls (EN010119)

Deadline 4 **25 April 2025**

Suffolk County Council

Suffolk County Council (20049304)

Representation on the duty in s.85(A1) of the Countryside and Rights of Way Act 2000

Five Estuaries (EN010115)

Deadline 6

11 February 2025

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Glossary of Acronyms

SCH(AONB)	*(Suffolk Coast & Heaths) Area of Outstanding Natural Beauty*
CROWA	*Countryside and Rights of Way Act*
DCO	*Development Consent Order*
EIA	*Environmental Impact Assessment*
ExA	*Examining Authority*
ISH	*Issue Specific Hearing*
LIR	*Local Impact Report*
NPAACA	*National Parks and Access to the Countryside Act*
NPS	*National Policy Statement*
PA	*Planning Act*
SLVIA	*Seascape, Landscape and Visual Impact Assessment*
TCPA	*Town & Country Planning Act*
VE	*Five Estuaries*
ZTV	*Zone of Theoretical Visibility*

"the MP" refers to the Suffolk Coast & Heaths Area of Outstanding Natural Beauty Management Plan 2023-2028

"the NBSQI" refers to the Suffolk Coast & Heaths Area of Outstanding Natural Beauty and Special Qualities Indicators Report (2016)

"SCC" refers to Suffolk County Council

Purpose of this Submission

The purpose of this submission is to provide Suffolk County Council's ("SCC's") representation on the duty in section 85(A1) of the Countryside and Rights of Way Act ("CROWA") 2000, as requested by the Examining Authority ("ExA") during Issue Specific Hearing 6 ("ISH6"). The contents of this submission have been shared with

Essex County Council, Babergh District Council, and the Suffolk and Essex Coast & Heaths National Landscape Partnership who have each indicated their support. Examination Library references are used throughout to assist readers.

1 Representation on discharging the duty under section 85(A1) of the Countryside and Rights of Way Act 2000

1. CONTEXT

1.1 The Suffolk Coast and Heaths Area of Outstanding Natural Beauty ("SCHAONB") is a National Landscape. The extent of the SCHAONB is shown on Figure 10.6 in [APP-200]. Figure 10.6 also shows the relationship between the SCHAONB and the Applicant's Seascape, Landscape and Visual Impact Assessment ("SLVIA") Study Area and the location of the Five Estuaries ("VE") array areas within that Study Area. It is apparent that the great majority of the SCHAONB lies within the SLVIA Study Area. The SLVIA Study Area has been defined to embrace the Development Consent Order ("DCO") Order Limits together with the Zone of Theoretical Visibility ("ZTV") of the VE array areas (para 1.2.14 of [APP-197]). The full extent of the SLVIA Study Area is shown on Figure 10.4 in [APP-199]. The SCHAONB was first designated in 1970 and was enlarged to its present extent in 2020. Most of the SCHAONB is within SCC's administrative area but some parts of the Stour Estuary fall within the County of Essex.

1.2 SCC included the current SCHAONB Management Plan 2023-2028 ("the MP") as Appendix I to its Local Impact Report ("LIR") [REP2-046]. The MP is at pp.207-289 of [REP2-046]. SCC also included the SCHAONB Natural Beauty and Special Qualities Indicators report (2016) ("the NBSQI") as Appendix J to its LIR. The NBSQI is at pp.290-302 of [REP2-046]. The Natural Beauty Indicators for the SCHAONB in Section 2.0 of the NBSQI have been used by the Applicant in the SLVIA [APP-079] to frame its assessment of the effects of the VE array areas on the SCHAONB: see paras 10.7.41 and 10.11.79 and Table 10.14 of [APP-079]. Use of the NBSQI for this purpose is consistent with para 5.10.20 of EN-1, which expects that *"For projects which may affect… an AONBs the [applicant's] assessment should include effects on the natural beauty and special qualities of these areas."*

1.3 In the NBSQI there are six factors identified as Natural Beauty Indicators (in Section 2.0) which then are broken down into 35 sub-factors. These 35 sub-factors are described as SCHAONB Indicators in the SLVIA (Table 10.14). The SLVIA identifies that for the SCHAONB *"The scenic qualities and interest are particularly defined by the coast and views out to sea;… and seascape setting of the coastal areas of the AONB… The seascape setting of the coastal areas of the AONB contributes to the perception of wildness attributes and relative tranquillity"* (para 10.7.35).

2. EFFECTS ON THE SCHAONB

2.1 The Applicant has assessed the effects of the VE array areas on the SCHAONB within the SLVIA [APP-079], primarily in paras 10.11.171 to 10.11.280. Whilst the SLVIA includes a summary table of effects in Table 10.26, care should be taken in using this table because the *"Effect"* column only records the binary conclusion as to whether an effect is *"significant"* or *"not significant"* in Environmental Impact Assessment ("EIA") terms. It does not record either the magnitude of the change or the extent of significance of the effect (using the gradations for those matters in Table 1.8 of the SLVIA Methodology [APP-197]). Thus, Table 10.26 does not identify whether the magnitude of change is *"low"*, or *"negligible"*, nor whether the extent of significance of the effect is *"moderate/minor"* or *"minor".* For that further detail it is necessary to read the narrative text which relates to the effect in question.

2.2 Thus, for example, in relation to the NBSQI indicator of *"Relative wildness"*, which has five sub-factors of *"A sense of remoteness"*, *"A relative lack of human influence"*, *"A sense of openness and exposure"*, *"A sense of enclosure and isolation"*, and *"A sense of the passing of time and a return to nature"*, Table 10.26 simply records the effect in each case as *"Not significant"*. However, the more detailed narrative in paras 10.11.204 to 10.11.239 explains that in four of the five sub-factors (i.e. all barring *"A sense of enclosure and isolation"*) the assessed change is of *"low"* magnitude and its significance as an effect is *"moderate/minor"*.

2.3 As an aid to understanding the way in which the more detailed narrative explains the effects of the VE array areas on the SCHAONB, SCC has compiled a revised version of Table 10.26 of the SLVIA supplemented with a column to identify the magnitude of change and a column to identify the extent of significance of the effect, with cross-references to the paragraphs of the SLVIA that contain these conclusions. SCC has not sought to change the assessed magnitude of change or significance of effects, so the assessment remains that provided by the Applicant in the SLVIA. The revised version of Table 10.26 is attached as Appendix A. The revised version of Table 10.26 is consistent with the Applicant's own summary table of effects on the SCHAONB (Impact 16.7 in Table 10.39 of the SLVIA), which records an overall *"moderate/minor"* effect for which no mitigation is proposed, which leads to a residual impact which is *"moderate/minor in EIA terms"*, but the revised version of Table 10.26 in Appendix A relates that overall summary finding to the individual sub-factors in the Natural Beauty Indicators for the SCHAONB.

2.4 The Applicant's assessment shows that out of 35 sub-factors in the Natural Beauty Indicators, the effects of the VE array areas on the SCHAONB are

"moderate/minor" in 32 cases, *"minor"* in two cases (a sense of enclosure and isolation, and cultural heritage) and a change of *"zero magnitude"* in one case (natural heritage).

2.5 It also needs to be kept in mind that the Applicant has assessed all of the *"moderate/minor"* and *"minor"* effects of the VE array areas for the SCHAONB identified in the SLVIA as *"adverse"* effects. The Applicant has explained its approach in the SLVIA Methodology [APP-197], in particular at paras 1.10.8 to 1.10.10, and the Applicant has stated (in para 1.10.10) that *"Unless it is stated otherwise, the effects considered in the assessment have been considered to be adverse"*, with *"Adverse effects"* defined as *"… those that detract from the seascape/landscape character or quality of visual attributes experienced, through the introduction of elements that contrast, in a detrimental way, with the existing characteristics of the seascape, landscape and visual resource, or through the removal of elements that are key in its characterisation."*

2.6 Whilst the Applicant's SLVIA Methodology treats all landscape effects arising from the VE array areas on landscape character as indirect effects, this is because they are effects *"which will be perceived from the wider landscape, outside the DCO Order Limits and its seascape/landscape"* (para 1.5.7 of [APP-197]). In other words, direct effects in the Applicant's approach are confined to those experienced only by the *"host"* landscape/seascape within the Order Limits (para 1.10.5 of [APP-197]). Since the Order Limits do not include any part of the SCHAONB, necessarily any effects of the VE array areas on the SCHAONB are, on this approach, *"indirect effects"*. However, categorising effects of the VE array areas on the SCHAONB as *"indirect effects"* does not mean that those effects are not effects on or affecting the SCHAONB or not effects perceived/experienced from within the SCHAONB. This should not be in dispute, with it being accepted in the Applicant's comments in [REP5-073] that *"The Applicant acknowledges that effects arising within the SCHAONB result from the development itself"* (in its response to SCC.01). As is apparent from the SLVIA treatment of the baseline characteristics of the SCHAONB, the SCHAONB draws much of its special qualities from its seascape setting and the contribution of that seascape to the perception of relative wildness and relative tranquillity (paras 10.3.75 and 10.11.176 of the SLVIA). Whilst SCC is not in agreement with the Applicant's approach to the identification of indirect effects, for the purposes of these written submissions it is content to proceed on the basis of that approach.

2.7 Thus, the Applicant's SLVIA has identified that when the effects of the VE array areas on the SCHAONB are assessed using the identified Natural Beauty Indicators for the SCHAONB, those effects constitute

moderate/minor adverse effects on the SCHAONB in the great majority of cases (32 out of 35), minor adverse effects in two cases, and a zero magnitude change in only one case (concerning the natural heritage of the SCHAONB). Notwithstanding that none of these effects are significant effects in EIA terms, in 34 of the 35 cases they are still adverse effects. Their significance in EIA terms goes to the severity of the adverse effects on the SCHAONB but it does not mean that there is no adverse effect.

2.8 These conclusions from the Applicant's SLVIA provide the starting point for the consideration of the statutory AONB duty.

3. THE STATUTORY DUTY

3.1 The original power to designate AONBs was set out in the National Parks and Access to the Countryside Act ("NPAACA") 1949 (in its section 87), and that power then was carried forward into s.82 of the Countryside and Rights of Way Act 2000. Initially there was no duty imposed by the NPAACA 1949 in relation to the conservation and enhancement of the natural beauty of AONBs, but s.85(1) CROWA 2000 imposed a duty on certain bodies, when discharging their functions, to *"have regard"* to the purpose of *"conserving and enhancing the natural beauty of the area of outstanding natural beauty"*.

3.2 It is that *"have regard"* duty which (in England) has now been replaced by the duty in s.85(A1) CROWA 2000, as inserted by s.245(1) Levelling Up and Regeneration Act 2023 with effect from 26 December 2023.

3.3 The new duty in s.85(A1) CROWA 2000 is as follows:

"In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty in England, a relevant authority other than a devolved Welsh authority must seek to further the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty."

3.4 Both the Applicant and the determining Secretary of State are *"relevant authorities"* subject to this duty. The Applicant is a *"relevant authority"* as defined by s.85(2)(c) CROWA 2000 because it is a *"statutory undertaker"* within s.85(3) CROWA 2000. This is so, even in advance of any DCO being made on the present application, because the Applicant is at present a deemed statutory undertaker within Part 11 of the Town & Country Planning Act ("TCPA") 1990 by virtue of being a person holding an electricity generation licence (Licence No. 12292474 issued on 20 April 2021) under s.6(1) Electricity Act 1989 and so falling within the definition of a deemed

statutory undertaker in s.262(6) TCPA 1990.

3.5 The Secretary of State is a *"relevant authority"* because he is a *"Minister of the Crown"* as defined by s.85(2)(a) CROWA 2000.

3.6 The duty applies where any relevant authority is exercising or performing (on or after 26 December 2023) any *"functions in relation to, or so as to affect, land in an area of outstanding natural beauty in England".* The formulation of proposals for development, the carrying out of development, and the consenting of development on land (or water) that is not itself within an AONB can be functions within the scope of the duty if the carrying out of that development (or the consenting of that development so as to allow it to be carried out) would *"affect"* land within an AONB. There is no definition of *"affect"* in this context. However, SCC suggests that any external environmental effect of a development (outside of the AONB) that is capable of being experienced or perceived on land within the AONB (whether visually, aurally, or via other means or pathways) is an effect which can *"affect land in"* the AONB.

3.7 That interpretation reflects the guidance in EN-1 at paras 5.10.8 and 5.10.34 that *"The duty to seek to further the purposes of nationally designated landscapes also applies when considering applications for projects outside the boundaries of these areas which may have impacts within them"*. In a similar vein, the recent Defra guidance notes that "The duty also applies to functions undertaken outside of the designation boundary which affects land within the Protected Landscape" and makes specific reference to the fact that "Natural beauty, special qualities, and key characteristics can be highly dependent on the contribution provided by the setting of a Protected Landscape. Aspects such as tranquillity, … a sense of remoteness, wildness, … long views from and into a Protected Landscape may draw upon the landscape character and quality of the setting."

3.8 The Applicant has accepted (in its response to ExQ1_SLV.1.04 in [REP2-039]) that the VE array areas will have *"effects on the special qualities of the SCHAONB"* and will *"impact on the designated landscape"*, albeit that it considers those effects/impacts are modest:

"…The Applicant considers that it has sought to conserve the natural beauty of the SCHAONB through the siting of the VE array areas and mitigation embedded in the project design set out in Table 10.18 of 6.2.10 Seascape, Landscape and Visual Assessment of the ES [APP-079]. This has included siting of the VE array areas at long distance from the SCHAONB (over 37 km), largely behind existing wind farms; a reduction in the spatial extent of the array area to limit the northward spread; and a reduction in maximum

height of the WTGs (which has been further reduced at Deadline 1). As a result, although ***there will be effects on the special qualities of the SCHAONB, these are likely to be Moderate/Minor at worst, and they are not significantly adverse****…*

… The Applicant takes the strong position that the ***impact of the Project on the special qualities of the SCHAONB is of low magnitude****, not significant (moderate/minor) and indirect, and that the statutory purposes for designation of the SCHAONB will not be compromised. To reiterate further, the project is situated 37 km offshore at its closest point, with the majority of turbines beyond that distance (and behind existing projects) which further supports the conclusion of no significant effects and* ***the very limited impact on the designated landscape****."*

(emphasis added)

3.9 It should not therefore be in dispute that the duty is engaged in this case. The Applicant's assessment in the SLVIA [APP-079] identifies that there are multiple adverse effects on the special qualities (as shown by the Natural Beauty Indicators) of the SCHAONB (as set out above). Whilst views may differ on the severity of those effects, that is nothing to the point in terms of whether the VE array areas will *"affect land in the [SCHAONB]"* and so engage the duty in s.85(A1) CROWA 2000.

4. COMPLIANCE WITH THE DUTY

4.1 In considering the requirements of the duty, it is important to keep in mind the statutory provision itself and not to re-formulate the duty. The duty is not expressed as a duty to avoid compromising the purpose(s) of the AONB. The duty is not expressed as a duty to minimise adverse effects on the purpose(s) of the AONB. The duty is not expressed as a duty to avoid significant adverse effects on the AONB. The duty, in relation to the exercise of any function that affects land in the AONB, requires that the person subject to the duty *"must seek to further the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty."* Whilst the new words are the *"must seek to further"*, the statutory duty must be seen as a whole, including that that which must be sought to be furthered is the composite *"purpose of conserving and enhancing the natural beauty"* of the AONB in question.

4.2 Whilst there is no definition of *"natural beauty"*, it can be noted that there is some definition of what its conservation includes, in that s.92(2) CROWA 2000 provides:

"Any reference in this Part to the conservation of the natural beauty of an

area includes a reference to the conservation of its flora, fauna and geological and physiographical features."

4.3 Thus, component parts of the natural beauty of an area that should be conserved can include its flora, its fauna, its geological features, and its physiographical features. However, it is clear that this is not an exhaustive definition of features that make up *"natural beauty"* but merely identifies features that the concept *"includes".*

4.4 It is clear that development which takes place outside of an AONB, but which is visible from within it, is capable of having an adverse impact on the natural beauty of the AONB and so harming the AONB. This was the conclusion of an Inspector which was accepted by the High Court in the case of Bayliss v SSCLG [2013] EWHC 1612 (Admin). In Bayliss a wind farm was proposed on land some 800 metres outside of the Dorset AONB. An Inspector granted planning permission, despite finding that the proposal would cause some limited harm to the AONB. A legal challenge to that decision failed. For present purposes, the relevant parts of the judgment are at paras 15 and 16, where Hickinbottom J stated:

15. Having dealt with visual and residential amenity, and visual dominance (paragraphs 15-37) (including from Trigon: paragraphs 31-32), and noise (paragraphs 38-55), under the heading "Other matters", he [the Inspector] turned to deal with "Landscape considerations". In paragraphs 56-58, he dealt with general visual impact issues. ***He dealt with the impact of the development specifically on the AONB in paragraph 59, as follows****:*

*"****Turning to the effect on the AONB itself, the site lies about 800m outside its Purbeck northern boundary. The turbines would be visible from within it as an incongruous and intrusive element on higher ground****, particularly from the Purbeck Way alongside the Frome, although roads and railways also impinge on these views. In longer views from higher ground on the Purbeck Ridge such as the important view from Creech Hill, the turbines would be below the horizon and whilst noticeable, would be subsumed by the wider prospect.* ***Although there would be an adverse impact on the natural beauty of the adjacent "Frome Valley pasture" part of the Dorset AONB, the impact would be limited****."*

16. ***It is clear from that paragraph that, as Mr Edwards submitted, the Inspector, having specifically considered the issue of harm to the AONB, found that the development would have an adverse impact on the views from, and hence result in harm to, the AONB. His consideration of that harm was particular: he considered that the development would cause limited harm to a limited part of the AONB, namely the Frome Valley Pasture.*** *Having made that finding, the*

Inspector reverted to general landscaping issues in paragraphs 60-61: despite Mr Edwards' submission to the contrary, his finding in paragraph 61 that "a significant adverse landscape impact would occur at distances up to 3km…" was clearly a conclusion in relation to the general landscape impact, and not in respect of the impact on the AONB although part of that area is of course within that 3km distance. ***The adverse impact on the AONB is dealt with in paragraph 59.****"*

(emphasis added)

4.5 The Inspector's planning judgment in that case was that wind turbines outside of the AONB would have an adverse effect on the natural beauty of a particular part of the AONB but that the impact would be limited. Hickinbottom J considered that the Inspector's finding that there would be an adverse impact on the views from the AONB was addressing whether there would be harm to the AONB and his finding of an adverse impact on views was a finding that would *"hence result in harm to the AONB".* This was so notwithstanding that the Inspector considered the harm caused to be *"limited harm to a limited part of the AONB".*

4.6 Hickinbottom J rejected the legal challenge which argued that the Inspector had failed to give due weight to this harm by reference to the policy in the National Planning Policy Framework that *"great weight"* should be given to conserving the AONB, stating (at para 17) that:

"… I accept that a well-placed reference to paragraph 115 of the NPPF and/or the particular "great weight" given to the harm to the AONB as the Inspector had found it to be may have been helpful, in the sense that, had it been included, it may well have resulted in this challenge never being attempted; but, in my judgment, paragraph 59 makes clear that the Inspector had well in mind the special nature of the AONB and harm the development may have upon it. The only reason for him considering harm to the AONB discretely was that he understood that such harm was to be inherently given particular weight as required by the NPPF."

4.7 The case of Bayliss went to the Court of Appeal, where the judgment of Hickinbottom J was upheld (see [2014] EWCA Civ 347), but nothing further was said on the question of whether limited adverse impacts could constitute harm to the AONB.

4.8 Of course, the Inspector's decision in Bayliss was a planning judgment on the particular facts of that case, but it illustrates the point (as recognised by Hickinbottom J at para 16) that where a development is outside of but visible from the AONB, a legitimate finding can be that this will have an adverse impact on and so cause harm to the natural beauty of the AONB.

4.9 It can be noted that the Secretary of State (here meaning the Secretary of State for Environment, Food and Rural Affairs) is empowered by s.85(1A) CROWA 2000 to make regulations which *"make provision about how a relevant authority is to comply with the duty under subsection (A1)"* but at present no such regulations have been made. The Defra guidance issued in December 2024 (discussed below) is guidance and carries weight as such but it does not have any statutory under-pinning.

4.10 There is also guidance on the new duty in EN-1 and this guidance (being in an National Policy Statement ("NPS")) does have statutory under-pinning by virtue of s.5(1) Planning Act ("PA") 2008. Obviously, as guidance, it needs to be read in the context of the statutory duty itself and it cannot change the terms of that duty. As with all such guidance, it is important to read it as a whole.

4.11 It is significant, when considering the advice in para 5.10.7 and in para 5.10.8 of EN-1, that no distinction is drawn as regards what the Secretary of State needs to be satisfied about irrespective of whether a development is located within a designated landscape or outside of it. In both cases, the advice is that *"[T]he Secretary of State should be satisfied that measures which seek to further purposes of the designation are sufficient, appropriate and proportionate to the type and scale of the development."* This lack of distinction reflects the terms of the duty, which is identical whether a development is within an AONB or is outside and *"affects"* an AONB. The expectation that measures are *"sufficient"* inevitably raises the question of 'sufficient for what purpose?' and that can only sensibly mean sufficient to enable the duty to be discharged. Measures which fall short of allowing the Secretary of State to be satisfied of that outcome will not be *"sufficient".*

4.12 In making this point SCC is not overlooking the fact that the duty itself is a measured duty. It is a duty, when performing functions that will *"affect land in [the SCHAONB]"*, to *"seek to further the purpose of conserving and enhancing the natural beauty of the [SCHAONB]".* If the person subject to the duty has sought to further that purpose, the duty can be met, even if the purpose is not ultimately achieved, but it will be necessary to test what that person has sought to do to further that purpose in order to see whether that is *"sufficient".*

4.13 Para 5.10.34 of EN-1 repeats the point that the duty applies to projects outside of protected landscapes which may have impacts within them. The immediately following sentence cannot be read as seeking to depart from the statutory duty. Its statement that *"The aim should be to avoid harming the purposes of the designation or to minimise adverse effects on designated landscapes…"* has to be read in the context of a requirement to *"seek to further the purpose of conserving and enhancing the natural beauty*

of the [designated landscape]." The avoidance of harm or the minimisation of adverse effects will not be sufficient if nothing has been done to *"seek to further"* the purpose of conserving and enhancing natural beauty. Avoidance of harm or the minimisation of adverse effects may have sufficed under the previous *"have regard"* duty, but in the absence of any action seeking to further the purpose of conserving and enhancing natural beauty, those aims alone cannot now be regarded as sufficient to meet the new duty.

4.14 The advice in para 5.10.34 of EN-1 that *"The fact that a proposed project will be visible from within a designated area should not in itself be a reason for the Secretary of State to refuse consent"* is simply making the point that mere intervisibility should not *"in itself"* be a ground for refusal. What matters is the assessed impact of such intervisibility, which may or may not have adverse effects, and where they are adverse may have differing degrees of severity. Inevitably, these will be fact sensitive judgments in the light of the particular circumstances.

4.15 Whilst intervisibility plays its part in most of the assessed effects of the VE array areas on the SCHAONB as recorded in the SLVIA, as already noted, it is the Applicant's assessment that in all but one case those assessed effects are *"adverse"* effects. The SLVIA Methodology allowed for the identification of *"neutral"* effects, as well as those which were *"adverse"* or *"beneficial"*, and makes the point directly that *"A change to the seascape, landscape and visual resource is not considered adverse simply because it constitutes an alteration to the existing situation"* (para 1.10.10 of [APP-197]). Conversely, the SLVIA Methodology includes as an *"adverse"* effect *"the introduction of elements that contrast, in a detrimental way, with the existing characteristics of the seascape, landscape and visual resource"* (para 1.10.10 of [APP-197]). Thus, the assessed adverse effects of the VE array areas in the SLVIA on the SCHAONB reflect more than mere intervisibility between the VE array areas and the SCHAONB. It is not that the VE array areas will alter the existing situation, it is that they will do so in a detrimental way, according to the Applicant's own assessment, and it is that consequence which results in the adverse effects on the SCHAONB.

4.16 The recent Defra guidance is clear that *"The duty is an active duty, not passive, which means:*

- *a relevant authority should take appropriate, reasonable, and proportionate steps to explore measures which further the statutory purposes of Protected Landscapes*
- *as far as reasonably practicable, relevant authorities should seek to avoid harm and contribute to the conservation and*

enhancement of the natural beauty, special qualities, and key characteristics of Protected Landscapes

…

- *for… development management decisions affecting a Protected Landscape, a relevant authority should seek to further the purposes of the Protected Landscape – in so doing, the relevant authority should consider whether such measures can be embedded in the design of plans and proposals where reasonably practical and operationally feasible…"*

4.17 The second bullet point of the guidance confirms the position that the discharge of the duty requires more than merely seeking to avoid harm. That is part of what is expected, but the guidance also expects those persons subject to the duty to seek to contribute to the conservation and enhancement of natural beauty and special qualities of the Protected Landscape, *"as far as is reasonably practical".* This latter phrase echoes the advice that measures to that end should be *"sufficient, appropriate and proportionate"* in para 5.10.8 of EN-1.

4.18 Obviously, a judgment is required as to whether a person subject to the duty has gone *"as far as is reasonably practical"* in seeking to further the purpose of conserving and enhancing the natural beauty of the SCHAONB, and that judgment will be informed by the function that is being exercised. Where that function rests with the promoter of a project, it is reasonable to look at the nature of that project and what it is feasible for the promoter to do, having regard to the effects of the project on the SCHAONB.

4.19 It is not sensible to look at examples of how the Secretary of State discharged the earlier duty in the case of other offshore wind farm projects (such as at East Anglia TWO (2022), Awel y Mor (2023) or the original Sheringham Shoal and Dudgeon (2008) decisions) which the Applicant has argued provide *"a useful benchmark"* in [REP5-073] (in its comments on SCC.04). They are not a useful benchmark because they are not applying the *"must seek to further"* duty in s.85(A1) CROWA 2000, and nor do they take account of the guidance on that duty in EN-1 (2024) or in the Defra guidance. Even the more recent Sheringham Shoal and Dudgeon Extension decision (April 2024) was made in circumstances where that Examining Authority did not address the new duty or the new guidance (because of the timing of the ExA's report in October 2023) and the Secretary of State did not have the benefit of any detailed submissions on the new duty or that guidance (and did not have the Defra guidance in any

event).

4.20 Given that in this case there is no scope for dispute that the VE array areas will have adverse effects on the natural beauty of the SCHAONB (as set out in the SLVIA), it is apparent that its natural beauty is not being conserved and enhanced by the implementation of the project. It is no answer to argue that the purpose of the designation of the SCHAONB will not be *"compromised"*, in the sense that the designation will continue to exist and the SCHAONB will continue to have special qualities that constitute its natural beauty. Those special qualities will be diminished and detrimentally affected by the VE array areas. The natural beauty of the SCHAONB will therefore not be conserved (i.e. maintained or preserved in its existing condition), still less will it be enhanced.

4.21 The Applicant's contention (in its comments at SCC.04 of [REP5-073]) that "*for the statutory purpose of the SCHAONB to be compromised, it would be necessary to conclude that the effects on special qualities were fundamental to the purposes for designation and affected to such a degree that the identified effects compromised those purposes and its overall integrity"* has no provenance in the terms of the statutory provisions or in any relevant guidance. It is a self-created test of the Applicant that sets the bar far too high and is inconsistent with a mandatory duty to *"seek to further the purpose of conserving and enhancing the natural beauty of [the SCHAONB]"*. Simply avoiding the magnitude of adverse impacts that would fundamentally threaten the very integrity of the SCHAONB falls a long way short of compliance with the new duty.

4.22 Consequently, it is necessary to explore (as per the Defra guidance) whether anything can be reasonably and practically done to seek to further the purpose of conserving and enhancing the natural beauty of the SCHAONB, in the context of the VE project. Whilst SCC notes that the Applicant has taken steps in the location of the VE array areas and in the design (and height) of the Wind Turbine Generators to minimise the impacts on the SCHAONB, nonetheless, the assessment in the SLVIA that there will be adverse effects is an assessment which reflects those steps. The question now, in the light of the conclusions set out in the SLVIA, is therefore whether the Applicant has gone *"as far as is reasonably practical"* to explore measures to further the purpose of conserving and enhancing the natural beauty of the SCHAONB.

4.23 SCC is wholly unpersuaded that the Applicant has indeed gone as far as is reasonably practical. Instead of engaging with the fact that its own SLVIA identifies a multitude of residual adverse effects, and so necessarily does not conserve (let alone enhance) the natural beauty of the SCHAONB, the Applicant has simply advanced the proposition that it is not incumbent on it

to do anything about those adverse effects, on the basis that in EIA terms they are *"not significant"* effects. This, of course, is nothing to the point in the context of the *"active"* duty in s.85(A1) CROWA 2000, which is not concerned with EIA impacts.

4.24 Whilst the Applicant has been critical that SCC has not suggested specific measures that the Applicant should bring forward in order to satisfy the requirements of the new duty, this criticism is misplaced. The Defra guidance is clear that it is incumbent on those persons subject to the duty to *"take appropriate, reasonable, and proportionate steps to explore measures which further the statutory purposes of Protected Landscapes".* The Defra guidance is also clear that those persons subject to the duty should address the question *"Has the relevant Protected Landscape team been approached for their view on whether or not measures help to deliver the Protected Landscape's Management Plan and further the purposes of the designation?"*

4.25 The Applicant has not engaged with the Suffolk and Essex Coast & Heaths National Landscape Partnership on such measures, because its position is that it is not required to put forward such measures to meet its duty in s.85(A1) CROWA 2000.

4.26 SCC provided the MP for the SCHAONB with its LIR (in its Appendix I). SCC was also quite explicit in the LIR (at para 7.37):

"To the extent that, even with the minimisation of harmful impacts, there will still be residual harm to the SCHAONB, SCC considers that the new duty to seek to conserve and enhance the natural beauty of the SCHAONB requires measures to be put forward, so far as practical, to offset that harm. SCC would welcome discussions with the Applicant, in conjunction with the Suffolk and Essex Coast & Heaths National Landscape Partnership, on proportionate and deliverable improvement measures that could be undertaken to enhance the natural beauty of the SCHAONB by way of offsetting the residual harm."

4.27 Despite that clear invitation for engagement, the response from the Applicant has been simply to assert that there is no obligation on it to do anything to address the adverse effects it has identified, on the mistaken basis that it does not consider that they constitute *"harm"* to the AONB (as asserted in the Applicant's comments in SCC.01 and SCC.04 of [REP5-073]). As is quite clear from the decision in Bayliss even a *"limited adverse"* effect on the AONB can constitute *"harm"* to the AONB. There is no warrant or justification in either the statutory provisions or guidance that there is some minimum threshold before an adverse effect can constitute harm to the purposes of the AONB (as the Applicant wrongly contends in its

comments at SCC.04 of [REP5-073]).

4.28 SCC does not consider that expecting the Applicant to undertake (or otherwise secure the undertaking of) improvement measures within the SCHAONB to enhance the natural beauty of the SCHAONB by way of offsetting the residual harm that the VE array areas cause to the natural beauty of the SCHAONB is in any way contrary to any guidance or case law. Measures which are directed to offsetting the adverse effects/residual harm caused by a proposal, provided that they are proportionate and reasonably related to those adverse effects/residual harm, would serve a clear planning purpose and could be seen as measures that are necessary in planning terms in order to address an applicable statutory duty. SCC has not, at this stage, sought to be prescriptive about the mechanisms that could be used to achieve this outcome but is aware that in post-examination correspondence concerning the Lower Thames Crossing an additional requirement has been proposed by the Department for Transport (in its letter dated 26 July 2024) specifically to address the need for measures to ensure compliance with the duty in s.85(A1) CROWA 2000. Other mechanisms could be in the form of a legal agreement.

4.29 In conclusion, SCC maintains its position that, as matters stand, the Applicant has failed to satisfy the new statutory duty in s.85(A1) CROWA 2000 and, if that remains the case during the Examination, SCC does not consider that the Secretary of State will be able to conclude that the Applicant has sought to further the purpose of conserving and enhancing the natural beauty of the SCHAONB. In terms of the guidance in EN-1 at para 5.10.8, the Secretary of State will not be able to be satisfied that the Applicant has proposed *"measures which seek to further the purposes of the designation"* and, necessarily, there will be a failure to provide measures which are *"sufficient, appropriate and proportionate to the type and scale of the development"*. In those circumstances, SCC considers that the Secretary of State will not be able to be satisfied as regards the discharge of his own duty under s.85(A1) CROWA 2000, without first requiring some further action by the Applicant.

4.30 For the purpose of these submissions, which are directed only to the duty in s.85(A1) CROWA 2000, SCC has not addressed the wider question of whether the non-compliance (at present) that it has identified with para 5.10.8 of EN-1 has implications for whether the application can be seen to be in accordance with EN-1, when taken as a whole, and so has not addressed the consequential implications for compliance with section 104(3) of the Planning Act 2008. Such matters go beyond the question of compliance with the duty in s.86(A1) CROWA 2000. SCC very much hopes that the Applicant will reflect on its position in the light of these submissions

and will engage actively with SCC and with the Suffolk and Essex Coast & Heaths National Landscape Partnerships on measures that can be taken, potentially on a ‘without prejudice’ basis, to address the duty in s.85(A1) CROWA 2000 during the remainder of the Examination. However, SCC does note, in any event, that s.104(3) PA 2008 is subject to s.104(5) PA 2008, and that the duty in s.85(A1) CROWA 2000 is a duty on the Secretary of State contained in an enactment within the scope of s.104(5) PA 2008. Thus, were the Secretary of State to conclude that the duty in s.85(A1) CROWA 2000 has not been met, there would be no imperative to determine the application in accordance with EN-1, even if it were to be concluded that the application is in accordance with it.

Suffolk County Council

Suffolk County Council (20049304)

Representation on the duty in s.85(A1) of the Countryside and Rights of Way Act 2000: Appendix A – Revised Table 10.26 of the Applicant's SLVIA

Five Estuaries (EN010115)

Deadline 6

11 February 2025

1 Revised Table 10.26 of the Applicant's Seascape, Landscape and Visual Impact Assessment (SLVIA) [APP-079]

Special quality	Factor	Magnitude of change	Assessment of significance	Paragraph ref for [APP-079]
LANDSCAPE QUALITY	Intactness of the landscape in visual, functional and ecological perspectives	low magnitude	Moderate/minor adverse (not significant), indirect, long-term and reversible	10.11.182
	The condition of the landscape's features and elements	low magnitude	Moderate/minor adverse (not significant), indirect, long-term and reversible	10.11.183
	The influence of incongruous features or elements	low magnitude	Moderate/minor adverse (not significant), indirect, long-term and reversible	10.11.189
SCENIC QUALITY	A distinctive sense of place	low magnitude	Moderate/minor adverse (not significant), indirect, long-term and reversible	10.11.192

Special quality	Factor	Magnitude of change	Assessment of significance	Paragraph ref for [APP-079]
(cont.) SCENIC QUALITY	Striking landform	low magnitude	Moderate/minor adverse (not significant), indirect, long-term and reversible	10.11.194
	Visual interest in patterns of land cover	zero change	Negligible (not significant), indirect, long-term and reversible	10.11.195
	Appeal to the senses	low magnitude	Moderate/minor adverse (not significant), indirect, long-term and reversible	10.11.198
	Memorable or unusual views and eye-catching features or landmarks	low magnitude	Moderate/minor adverse (not significant), indirect, long-term and reversible	10.11.201
	Characteristic cognitive and sensory stimuli	low magnitude	Moderate/minor adverse (not significant), indirect, long-term and reversible	10.11.203
RELATIVE WILDNESS	A sense of remoteness	low magnitude	Moderate/minor adverse (not significant), indirect, long-term and reversible	10.11.219

Special quality	Factor	Magnitude of change	Assessment of significance	Paragraph ref for [APP-079]
(cont.) RELATIVE WILDNESS	A relative lack of human influence	low magnitude	Moderate/minor adverse (not significant), indirect, long-term and reversible	10.11.225
	A sense of openness and exposure	low magnitude	Moderate/minor adverse (not significant), indirect, long-term and reversible	10.11.228
	A sense of enclosure and isolation	low magnitude	Minor adverse (not significant), indirect, long-term and reversible	10.11.233
	A sense of the passing of time and a return to nature	low magnitude	Moderate/minor adverse (not significant), indirect, long-term and reversible	10.11.239
RELATIVE TRANQUILLITY	Contributors to tranquillity	low magnitude	Moderate/minor adverse (not significant), indirect, long-term and reversible	10.11.248
	Detractors from tranquillity	negligible magnitude	Negligible (not significant), indirect, long-term and reversible	10.11.250

Special quality	Factor	Magnitude of change	Assessment of significance	Paragraph ref for [APP-079]
NATURAL HERITAGE FEATURES	Geological and geo-morphological features	zero magnitude	Negligible (not significant), indirect, long-term and reversible	10.11.251
	Wildlife and habitats	zero magnitude	Negligible (not significant), indirect, long-term and reversible	10.11.251
CULTURAL HERITAGE	Built environment, archaeology and designed landscapes	negligible magnitude	Negligible (not significant), indirect, long-term and reversible	10.11.256
	Historic influence on the landscape	negligible magnitude	Negligible (not significant), indirect, long-term and reversible	10.11.256
	Characteristic land management practices	negligible magnitude	Negligible (not significant), indirect, long-term and reversible	10.11.256
	Associations with written descriptions	negligible magnitude	Negligible (not significant), indirect, long-term and reversible	10.11.256
	Associations with artistic representations	negligible magnitude	Negligible (not significant), indirect, long-term and reversible	10.11.256

Special quality	Factor	Magnitude of change	Assessment of significance	Paragraph ref for [APP-079]
(cont.) CULTURAL HERITAGE FEATURES	Associations of the landscape with people, places or events	negligible magnitude	Negligible (not significant), indirect, long-term and reversible	10.11.256

Suffolk County Council

Suffolk County Council (20050784)

Appendix B: Representations submitted at Deadline 6A of the Five Estuaries Examination responding to submissions made at Deadline 6 following Action Point 9 of ISH6

North Falls (EN010119)

Deadline 4 **25 April 2025**

Suffolk County Council

Suffolk County Council (20049304)

Representations responding to submissions made at Deadline 6 following Action Point 9 of ISH6

Five Estuaries (EN010115)

Deadline 6A **21 February 2025**

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Glossary of Acronyms

AONB	*Area of Outstanding Natural Beauty*
CNP	*Critical National Priority*
CROWA	*Countryside and Rights of Way Act*
D6	*Deadline 6*
DCO	*Development Consent Order*
EA	*Electricity Act*
EIA	*Environmental Impact Assessment*
ExA	*Examining Authority*
ISH	*Issue Specific Hearing*
N2T	*Norwich to Tilbury*
NPS	*National Policy Statement*
NSIP	*Nationally Significant Infrastructure Project*
PA	*Planning Act*
SCHAONB	*Suffolk Coast & Heaths Area of Outstanding Natural Beauty*
SLVIA	*Seascape, Landscape and Visual Impact Assessment*
VE	*Five Estuaries*
WTG	*Wind turbine generator*

"The Council" / "SCC" refers to Suffolk County Council

Purpose of this Submission

The purpose of this submission is to provide responses to the submissions at Deadline 6 ("D6") following Action Point 9 from Issue Specific Hearing 6 ("ISH6"), in relation to the s.85(A1) Countryside and Rights of Way Act ("CROWA") duty. Examination Library references are used throughout to assist readers.

Preliminary

1. These representations by Suffolk County Council respond to the submissions made by the Applicant at Deadline 6 following Action Point 9 from ISH6. The representations are made at Deadline 6A, the purpose of which is described in item 21 of the revised timetable set out in Annex A of [PD-025], namely:

"Receipt by the ExA of:
Responses to any submissions made at Deadline 6 pursuant to Action Point 9 arising from the holding of Issue Specific Hearing 6"

2. Action Point 9 (as set out in [EV10-012]) was:

"Consolidated/full submissions on the interpretation of Section 85 of the Countryside and Rights of Way Act 2000, as amended by the Levelling Up and Regeneration Act 2023 and the application of the duty in this case"

3. In response to Action Point 9, SCC submitted its representations on the duty in section 85(A1) CROWA 2000 at [REP6-074] and the Applicant submitted its submissions on section 85 CROWA 2000 at [REP6-048] and an Opinion of King's Counsel (Mr Hereward Phillpot KC) at [REP6-050]. For convenience, the SCC representations will be referred to as 'SCC's Representations', the Applicant's submissions will be referred to as 'Applicant's Submissions', and the Opinion from Mr Phillpot KC will be referred to as 'the Opinion'.

Response to the Applicant's submissions [REP6-048]

4. Given the extensive earlier submissions and representations on this topic, which SCC is sure that the Examining Authority ("ExA") has already absorbed, SCC does not consider that the ExA will be greatly assisted by a point-by-point response to every element in the Applicant's Submissions. SCC has therefore concentrated on the main arguments made in the

Applicant's Submissions and provided its response to those arguments. It should not be assumed that elements not responded to are accepted by SCC.

Is the Applicant subject to the duty in s.85(A1) CROWA 2000?

5. SCC notes that it is not in dispute that the Applicant is a *"statutory undertaker"* by virtue of holding an electricity generation licence (which is confirmed at para 2.2.4 of the Applicant's Submissions), however, SCC is surprised that the Applicant argues (at para 2.2.5) that it is not a *"relevant authority"* within s.85(A1) CROWA 2000 because, in the Applicant's view, it is not exercising or performing any statutory function when making an application for a Development Consent Order ("DCO").

6. SCC notes that s.85(A1) CROWA 2000 applies when a *"relevant authority"* (which includes *"any statutory undertaker"* as defined by s.85(3) CROWA 2000) is *"exercising or performing any function"* relating to or affecting an Area of Outstanding Natural Beauty ("AONB"), and there is no requirement for the *"relevant authority"* to be exercising a *statutory* function. Noting that the definition of *"relevant authority"* includes *"any Minister of the Crown"* and that some ministerial functions are undertaken by virtue of prerogative powers rather than statutory provisions, and that the exercise of prerogative powers could just as much impact on an AONB as could the exercise of statutory powers, SCC is not persuaded that s.85(A1) CROWA 2000 is limited only to the exercise or performance of *statutory* functions by the relevant authority. No such limitation appears in the legislative provision itself and nor, in this context, should such a limitation be implied. Thus, the undisputed fact that the Applicant is a statutory undertaker, and so a relevant authority, is a sufficient basis to bring it within the scope of s.85(A1) CROWA 2000 when it exercises or performs *"any function"* which relates to or affects an AONB, irrespective of whether that function flows from or involves the discharge of a statutory power or duty.

7. However, even if it were to be the case that it is necessary for there to be the exercise or performance of a *statutory* function, it is SCC's view that

when the Applicant makes a DCO application in order to authorise it to carry out a development project which must be consented under the Planning Act ("PA") 2008, the Applicant is exercising or performing a statutory function.

8. First, the exercise or performance of a statutory function would be the exercise or performance of any statutory power or duty which is applicable to the Applicant, as a *"statutory undertaker"*, in the context of making a DCO application.

9. Second, whenever the Applicant, as a licence holder under s.6(1)(a) Electricity Act ("EA") 1989, formulates any proposals for the construction of a generating station with a capacity of not less than 10 MW or for the installation (above or below ground) of an electricity line, it is subject to a statutory duty to have regard to *"the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest".* This duty is set out in s.38 and paragraph 1(1)(a) of Schedule 9 to the EA 1989. The relevant statutory provisions are as follows:

10. S.38 EA 1989 provides:

"The provisions of Schedule 9 to this Act (which relate to the preservation of amenity and fisheries) shall have effect."

11. The relevant parts of Schedule 9 to the EA 1989 provide:

"1(1) In formulating any relevant proposals, a licence holder or a person authorised by exemption to generate, distribute, supply or participate in the transmission of electricity —

(a) shall have regard to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest; and

(b) shall do what he reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on any such flora, fauna, features, sites, buildings or objects.

…

(3) In this paragraph –

…

"relevant proposals" means any proposals –

(a) for the construction or extension of a generating station of a capacity not less than 10 megawatts, or for the operation of such a station in a different manner;
(b) for the installation (whether above or below ground) of an electric line; or
(c) for the execution of any other works for or in connection with the transmission or supply of electricity."

12. S.3A(8) EA 1989 (which is applicable to s.38 EA 1989) provides:

"In this Part, unless the context otherwise requires–

…

"licence" means a licence under section 6 and "licence holder" shall be construed accordingly."

13. Thus, when the Applicant formulated its proposals for the Five Estuaries project, which involves the construction of a generating station substantially in excess of 10 MW (stated to be in excess of 100 MW in the DCO application) and the installation of electricity lines both below and above ground, it was subject to the statutory duty in paragraph 1(1)(a) of Schedule 9 to the EA 1989 to have regard to the desirability of preserving natural beauty (etc). That statutory duty continued at least until the Applicant put forward those proposals in its DCO application, which it made on 22 March 2024 (some 3 months after the duty in s.85(A1) CROWA 2000 came into effect). It was the DCO application which comprised the crystallisation of the Applicant's *"formulating"* of its proposals because prior to that point it was open to the Applicant to revise

or refine those proposals. It is therefore unnecessary to determine whether the duty in paragraph 1(1)(a) of Schedule 9 to the EA 1989 continues to apply to the Applicant (or whether now that the DCO application has been made, the process of *"formulation"* has ended). Whatever view is taken on that matter (and SCC is minded to the view that the duty continues because the Applicant may well choose to revise its proposals further during the Examination), the duty was applicable at the time that the DCO application was being made.

14. On that basis, it is inevitable that the Applicant, as a *"statutory undertaker"*, was performing the statutory function in para 1(1)(a) of Schedule 9 to the EA 1989 when it made its DCO application. In formulating its proposals for the Five Estuaries project, as constituted in the DCO application, including construction of a generating station (in excess of 10 MW) together with the installation electricity lines, the Applicant was therefore obliged to discharge its statutory duty of having regard to the desirability of preserving natural beauty (etc).

15. In performing that duty (which is unarguably a statutory function of the Applicant as a *"statutory undertaker"*), the Applicant was (on and after 26 December 2023) therefore subject, in addition, to the new duty in s.85(A1) CROWA 2000, if what it was proposing would *"affect"* any land within an AONB. It is, of course, quite irrelevant that the statutory duty in para 1(1)(a) of Schedule 9 to the EA 1989 is both broader in scope and less onerous than the new duty in s.85(A1) CROWA 2000. That new duty applies whenever any pre-existing function is being performed or exercised, regardless of its particular terms. Whilst the Applicant has raised a separate argument about the issue of whether its proposals will *"affect"* the AONB (responded to below), if the ExA considers that the DCO application will *"affect"* land within an AONB (which SCC considers is clearly established by the Applicant's own evidence), then it is inevitably the case that the Applicant (as well as the Secretary of State) is a person subject to the duty in s.85(A1) CROWA 2000.

Would the Five Estuaries array areas "affect" land within the AONB?

16. The duty in s.85(A1) CROWA 2000 applies when a relevant authority is *"exercising or performing any function in relation to, or so as to affect, land in an area of outstanding natural beauty in England".* If the function is the proposing of development (or formulating proposals for development), or authorising the construction of development), the duty applies both where the function is carried out *"in relation to land in"* an AONB and where the function is carried out *"so as to affect land in"* an AONB. The latter term is clearly capable of embracing development undertaken on land outside of an AONB where that development *"affects"* land within an AONB. This should not be controversial (and is clearly recognised in both EN-1 and in the Defra guidance).

17. However, the Applicant has now advanced the proposition (at para 5.1.3 of the Applicant's Submissions) that it *"does not accept that the planning decision on the proposed development 'affects' the SCHAONB".* This seems to be for three reasons: (a) a separation distance of 37 km, (b) a relationship derived from the visibility of the Five Estuaries ("VE") array areas, and (c) an assessment that the effects on the Suffolk Coast & Heaths Area of Outstanding Natural Beauty ("SCHAONB") are *"not significant"* adverse effects in Environmental Impact Assessment ("EIA") terms. This new argument is fundamentally inconsistent with the Applicant's response to ExQ1_SLV1.04 in [REP2-039], the relevant parts of which are set out at para 3.8 of SCC's Representations. It is also fundamentally inconsistent with the Applicant's acceptance (in its response to SCC.01 in [REP5-073]) that it acknowledges *"that effects arising within the SCHAONB result from the development itself".* The only effects of the development on the SCHAONB that the Seascape, Landscape and Visual Impact Assessment ("SLVIA") has identified are those that arise by reason of the visibility of the VE array areas from locations within the SCHAONB.

18. SCC does not understand how, having accepted that *"there will be effects on the special qualities of the SCHAONB"* and that *"the impact of the Project on the special qualities of the SCHAONB is of low magnitude"* (conclusions which flow directly from the Applicant's SLVIA), the Applicant can now suggest that development will simply not *"affect"* the SCHAONB (or land within it), and so, by implication, not engage the duty in s.85(A1) CROWA 2000 at all. Effects and impacts on the special qualities of the AONB, which are accepted by the Applicant to arise within the AONB as a result of the development, are necessarily effects and impacts which *"affect"* land within the AONB.

19. SCC also regards the Applicant's proposition as inconsistent with para 3.2.21 of the Applicant's Submissions, which accepts that *"the VE areas may result in some not significant (moderate/minor) effects of low magnitude on the identified special qualities [of the SCHAONB]."* The Applicant cannot credibly say that the proposal does not *"affect"* the SCHAONB and at the same time acknowledge (as it must because of the findings of its own SLVIA) that there will be adverse effects on the special qualities of the SCHAONB. It should be noted that the SLVIA does not use the term *"may"* to qualify the adverse effects it identifies, and the magnitude of change is an input to the degree of significance in the SLVIA assessment rather than a qualifier of it (as explained in the SLVIA Methodology).

20. In relation to the separation distance, that separation distance is acknowledged in the SLVIA and the findings of the SLVIA take full account of that separation distance. Similarly, the fact that the relationship is based on visibility is also recognised in the SLVIA and its assessment of adverse effects on the Natural Beauty Indicators of the SCHAONB is precisely by reason of that visibility. SCC has already set out (at paras 2.1 to 2.8 of the SCC Submissions) the salient references in the SLVIA where the Applicant's assessment finds there to be *"effects"* on the SCHAONB, which the Applicant has assessed as *"adverse".* Any assertion now that these adverse effects do not *"affect"* the SCHAONB is not only

unsupported by evidence, it is directly contradicted by the Applicant's own evidence in the SLVIA.

21. In relation to the Applicant's repeated references to the fact that the SLVIA categorises all of the adverse effects on the SCHAONB as *"not significant"* in EIA terms, this is nothing to the point in terms of whether the proposal will *"affect"* the SCHAONB. That term is not subject to a threshold that adverse effects have to be significant in EIA terms before they can *"affect"* the SCHAONB. The SLVIA and the SLVIA Methodology are perfectly clear that even non-significant adverse effects are detrimental to the SCHAONB (as set out in section 2 of the SCC Representations).

22. In passing, SCC would observe that parts of the Applicant's Submissions seek to re-interpret the findings of the SLVIA (for example at paras 3.2.12, 3.2.15, and 3.2.19). However, the SLVIA speaks for itself, and it remains the technical assessment on this matter, and SCC is quite sure that the ExA will rely on its actual findings (which SCC has already highlighted).

Can a non-significant adverse effect constitute harm?

23. To a large extent this is a non-issue because the SCC case on the duty in s.85(A1) CROWA 2000 does not turn on it being necessary for the ExA to make a finding that the effects of the VE array areas on the SCHAONB amount to *"harm".* SCC's position would be exactly the same even if the term 'harm' was not used and instead the effects were described as 'adverse effects' which are 'not significant' in EIA terms. That is how they are described in the SLVIA. It is worth emphasising that, for the purpose of SCC's Representations, SCC has not disputed the findings of the Applicant's SLVIA and so has proceeded on the basis that the SLVIA found that the VE array areas would have 'moderate-minor' or 'minor' effects (all of which are categorised as 'adverse' in accordance with the SLVIA Methodology) on the special qualities of the SCHAONB.

24. That said, if 'harm' is used as 'proxy' for 'not conserving' (as the Applicant suggests at para 2.5.3 of the Applicant's Submissions), SCC does not

understand how 'moderate-minor' or 'minor' adverse effects would not be 'harm' because, even though they may be towards the lower end of the spectrum of adverse effects, being adverse effects they are clearly 'not conserving' the SCHAONB.

Does SCC equate visibility with harm?

25. No. Notwithstanding the Applicant's attempts to so characterise SCC's position, SCC has not advanced such a case. Paras 4.14 and 4.15 of SCC's Representations address this issue, by reference to the findings of the SLVIA, applying the SLVIA Methodology.

26. In relation to the Howell case (referred to at para 2.6.3 and section 5.7 of the Applicant's Submissions), this establishes no point of law in relation to visibility. The key passage is in para 24 of the judgment, which is quoted in full at para 5.7.2 of the Applicant's Submissions, and that simply makes the obvious point that whether development outside of a designated area (there the Broads) but visible from with the designated area, will have damaging effects upon its natural beauty is a matter of fact and degree and not every piece of development will do so. It certainly does not establish the proposition that harm to the natural beauty of a designated area *cannot* arise from development outside it but visible from within it. As a matter of fact and degree and so planning judgment, this is not a matter of law but a matter for evidence, and the evidence here is the SLVIA and its findings of adverse effects.

27. The Applicant's Submissions advance a proposition which is at variance with the findings of the SLVIA when it asserts (at para 5.8.4) that *"the experience of the landscape cannot be reasonably held to be harmed by the addition of a small number of turbines, which are theoretically visible only in ideal weather conditions, are set in the context of closer and more prominent wind farms, and at a minimum 37km distant."* All of those factors were included in the assessment undertaken in the SLVIA and it concluded that, nonetheless, there were adverse effects on the special qualities of the SCHAONB.

Is the SCC case based on the setting of the SCHAONB?

28. No. Whilst it is the case that the VE array areas will be located outside of the SCHAONB and so, in that sense, within its setting, the adverse effects on the SCHAONB that SCC relies on in SCC's Representations are the adverse effects on the special qualities of the SCHAONB, as identified in the SLVIA. Those adverse effects are experienced (or perceived) within the SCHAONB.

Does the Critical National Priority ("CNP") policy presumption apply to the discharge of the s.85(A1) duty?

29. No. SCC disagrees with the suggestion in para 5.3.7 of the Applicant's Submissions that the presumption in paras 4.2.16 and 4.2.17 of EN-1 *"can clearly be applied to the duty of section 85 in the same way as it is applied to other statutory duties including for example harm to heritage assets which is given as an example in the list."*

30. EN-1 does give specific advice on how both applicants and the Secretary of State should approach compliance with the new duty in s.85(A1) CROWA 2000 (in particular at paras 5.10.7, 5.10.8, and 5.10.34). Nowhere in that text is there a reference to the CNP presumption being applicable to compliance with the duty. That is unsurprising because the duty is an active duty to seek to further the purpose of conserving and enhancing the natural beauty of the AONB rather than a duty to balance harms against benefits. If an applicant subject to the duty has not sought to further that purpose, there cannot be any presumption that the statutory duty has been met. The language of EN-1 cannot usurp the need to meet a statutory requirement and nor does it seek to do so. The advice on the CNP presumption includes (at para 4.2.10) that *"Applicants for CNP infrastructure must continue to show how their application meets the requirements in this NPS… as well as any other legal and regulatory requirements"*.

31. In any event, the presumption only operates if the Secretary of State is satisfied that the requirements in paras 4.2.10 to 4.2.13 of EN-1 *"have*

been met" (para 4.2.14). In other words, meeting *"other legal requirements"* is a pre-condition to the operation of the CNP presumption. In addition, as well as the requirement (above) in para 4.2.10, para 4.2.12 requires that *"Applicants should set out how residual impacts will be compensated for as far as possible."* In this case the Applicant has not sought to provide any compensation (or offsetting) for the residual impacts on the SCHAONB that are identified in the SLVIA. The measures that the Applicant has taken to minimise the adverse impacts (in terms of the locations, positioning, and heights of the wind turbine generators ("WTGs")) are already reflected and taken into account in the SLVIA and its identification of residual impacts is reached in the light of those measures. They cannot therefore be relied on as addressing the residual impacts. Thus, the pre-conditions for operation of the CNP presumption in relation to the s.85(A1) duty are not satisfied in any event.

Does compliance with the s.85(A1) duty require the least harmful configuration?

32. SCC has not argued that the s.85(A1) duty *requires* that only the least harmful configuration is consented but does maintain its view that if the project objectives can be achieved by a less harmful configuration, there needs to be a clear justification for allowing the Applicant the option to also construct a more harmful configuration. This point was made by SCC in [REP3-028]:

"… SCC considers that leaving both a more harmful and a less harmful option on the table would not fulfil the objective of minimising harm and therefore will require a specific justification. SCC is not claiming dogmatically that it is not possible for such a justification to be provided. Rather, SCC does not consider that in the material that the Applicant has thus far provided, that there has been an adequate justification. Even if such a justification were to be provided, SCC contends that there will be residual harm no matter whichever permutation comes to fruition, though to varying extents. This residual harm will require compensatory measures

so that the Applicant, and in due course, the Secretary of State, are able to satisfy the new positive duty now to be found in section 85 of the Countryside Rights of Way Act, 2000…"

33. SCC made the same point in [REP4-048] about there needing to be a justification for allowing a more harmful configuration if a less harmful configuration would also achieve the objectives of the project (as quoted at para 5.4.3 of the Applicant's Submissions).

34. The Applicant's Submissions seek to provide that further justification (in section 5.4). Whilst SCC does not necessarily agree with all of the Applicant's arguments, as there expressed, it is prepared to accept that the need for operational flexibility, combined with the limited degree of difference between the adverse effects of the different permutations, does provide the justification for allowing both the larger WTG and the smaller WTG options to remain within the project. However, this acceptance does not detract from SCC's position that the Applicant needs to propose further measures (to offset the residual adverse effects of whichever option is implemented) in order to achieve compliance with the duty in s.85(A1) CROWA 2000.

Would requiring offsetting measures be lawful and policy compliant?

35. SCC refers to (but does not repeat) what is set out in paras 4.20 to 4.29 of SCC's Representations which explain why it considers that the proposals will have adverse effects on the SCHAONB and so fail to *"conserve and enhance"* its natural beauty, why it accepts that, given the nature of the project, the Applicant cannot avoid or reduce those residual adverse effects, and why it considers that the Applicant needs at least to explore whether measures could be taken within the SCHAONB to compensate for (or offset) those residual adverse effects, in order to demonstrate compliance with the duty in s.85(A1) CROWA 2000.

36. There is no legal impediment to a requirement for the provision of offsetting measures, provided that there is a reasonable nexus between

the selected measures and the adverse effects which are to be offset, and the measures are proportionate to the scale of those adverse effects. Nor is there any policy objection to such a requirement if it is concluded (as SCC suggests is the case) that such measures are necessary to make the development acceptable in planning terms.

37. The Applicant has made much of the point that SCC has not suggested specific measures but this is unjustified (as explained at paras 4.24 to 4.26 of SCC's Representations). SCC also stated in [REP4-048] that such measures:

"… could be by arrangements to contribute funding which could be secured through a planning obligation. This funding could be administered by the Suffolk and Essex Coast and Heaths National Landscape Partnership, and be required to contribute towards relevant objectives of the SCHAONB management plan. SCC would defer to the Partnership on which objectives should be the focus of consideration but would expect them to be those most closely related to the experience of the coastal landscape and the seascape of the SCHAONB, and so most capable of offsetting (not mitigating) the residual harm caused to those aspects of its special qualities as well as furthering the statutory purposes."

38. SCC also drew attention to the position at the Lower Thames Crossing, where the Department for Transport (acting on behalf of the prospective decision maker and not the project promoter) has invited comments on a DCO requirement that would entail the provision of enhancement measures (financial or non-financial) to be agreed via the mechanism in that requirement. It is an obvious point but if there was some fundamental legal or policy objection to such an approach, no such requirement would have been put forward. The terms of the requirement can be seen here: https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010032/TR010032-006440-SoS%20Consultation%206%20Letter.pdf.

39. SCC remains ready and willing to engage with the Applicant, in conjunction with the Suffolk and Essex Coast & Heaths National Landscape Partnership, on both the nature of any measures and the mechanisms to secure them, whether that is during the remainder of the Examination or in the post-Examination decision period, in order to enable a means to address and resolve the outstanding issues on compliance with the duty in s.85(A1) CROWA 2000.

Response to the Opinion [REP6-050]

40. The Opinion addresses three issues but only issues (b) and (c) are relevant to SCC. Issue (b) is the duty in s.85(A1) CROWA 2000 and issue (c) is a phasing condition (persistently misdescribed as a Grampian condition despite SCC being quite explicit that its proposed condition does not restrict the commencement of development but merely the timing of one of the Works to be authorised, which the Applicant's programme indicates will not be carried out until Year 4 of the construction: Figure 1.21 of [APP-069]).

Issue (b): s.85(A1) CROWA 2000

41. It is noted that the Opinion does not address the question of whether the Applicant is a body subject to the duty.

42. There is a passing reference (at para 58) to *"county councils"* being subject to the duty. Since SCC is neither the promoter nor the decision maker it is doubtful it is exercising any relevant functions within the scope of the duty but in any event, by reason of the representations it is making to the ExA, it is undoubtedly seeking to further the purpose of conserving and enhancing the natural beauty of the SCHAONB.

43. There is an incomplete reference to s.85(A2) CROWA 2000, which omits the fact that it only applies to Welsh authorities, but this is not of consequence to the reasoning in the Opinion.

44. The Opinion does not address the inter-relationship between s.104(3) PA 2008 and s.104(5) PA 2008 but it is accepted in para 5.2.5 of the

Applicant's Submissions that the duty in s.85(A1) CROWA 2000 falls within s.104(5) PA 2008. That acceptance must be kept in mind when considering the point in para 97 of the Opinion that *"the duty is not to be regarded as overriding the decision-making framework created by the PA 2008 or other legislation that applies to the making of such decisions."* The decision-making framework of the PA 2008 necessarily includes s.104(5) PA 2008. Non-compliance with the duty, if still outstanding at the point of decision, would lead to a need to consider s.104(5) PA 2008, and whether that non-compliance would provide an exception to depart from s.104(3) PA 2008. In any event, if the Secretary of State was not satisfied as to compliance with the duty in s.85(A1) CROWA 2000, it would be open to him to conclude that the application was not in accordance with the relevant National Policy Statement ("NPS") (EN-1, having regard to its advice at para 5.10.8), and so that s.104(3) PA 2008 did not require a grant of development consent.

45. It is noted that the Opinion does not address the extent of impact on the AONB (see para 35) and it makes no reference to the findings in the SLVIA.

46. There is no dispute that the duty does not *"mandate any particular outcome"* (para 98), in that it is a measured duty to *"seek to further"* a stated purpose rather than to achieve that purpose regardless of any other matters, but SCC maintains that consideration does need to be given to what has been done to *"seek to further"* and whether, in the circumstances, that is sufficient to meet the duty.

47. In relation to the matters listed at para 103 of the Opinion that it is said the Secretary of State must have regard, SCC would not take issue.

48. Para 104 of the Opinion is directed to whether s.85(A1) CROWA 2000 *requires* the development to be reduced in scale but that has never been SCC's case. In any event, as indicated in the submissions above, SCC now accepts that the Applicant has justified the inclusion of options for configuration of the WTGs in the proposal. SCC notes and does not disagree with the proposition (in para 104(b)) that *"If the Secretary of State*

is satisfied that the proposed development has been designed sensitively given the various siting, operational and other relevant constraints, and that the measures taken by VE Ltd. which seek to further the purposes of the AONB designation are suitable, appropriate and proportionate to the type and scale of the development, the policy test in the NPS will be satisfied, even if there is concluded to be some residual harm" (SCC emphasis). SCC's disagreement with the Applicant concerns the fact that the Applicant has proposed no measures which seek to further the purpose of conserving and enhancing the natural beauty of the SCHAONB, having regard to the residual harm to the SCHAONB found by its own SLVIA.

49. SCC considers that the argument in para 104(c) and 104(d) on whether there exceptional circumstances to justify reducing the scale of CNP infrastructure, appears to overlook the guidance in paras 4.2.10 and 4.2.14 of EN-1 that the CNP presumption (and so the question of exceptional circumstances) only arises if the Secretary of State is already satisfied that the application meets the requirements in EN-1 (which includes para 5.10.8) and *"any other legal… requirements"* (which will include compliance with the duty in s.85(A1) CROWA 2000). However, as noted above, SCC is not seeking a reduction in the scale of the development.

50. Para 107 of the Opinion contends that SCC's position that the duty requires the applicant to offset the residual harm to the AONB is *"misconceived".* The reasons said to support this proposition do not address whether the Applicant has put forward measures that seek to further the purpose of conserving and enhancing the natural beauty of the SCHAONB. If measures are put forward, SCC would agree that they should not go beyond what is necessary to make the development acceptable in planning terms (having regard to the duty in s.85(A1) CROWA 2000). As to which party bears the responsibility to identify such measures, SCC refers to paras 4.24 and 4.25 of [REP6-074].

51. SCC does not agree that its suggestion as to what needs to be done to achieve compliance with the duty involves any legal error (para 108) but it

agrees that the duty should be applied in accordance with its statutory language, and having regard to the relevant guidance in EN-1 and the Defra guidance.

52. In relation to paras 109 and 110 of the Opinion, and the contention that *"there is therefore no legal or indeed logical basis to draw the distinction"* made by SCC between whether an effect on the AONB is *"significant"* for the purposes of EIA and whether an effect on the AONB *"affects"* the AONB and so gives rise to the duty in s.85(A1) CROWA 2000 to seek to further the purpose of conserving and enhancing the natural beauty of the AONB, SCC maintains its position. The legislation governing the EIA regime was formulated before the new duty. It is concerned with the identification of *"significant effects"* (whether positive, neutral, or negative) which are *"likely"* to arise from development defined as EIA development across the full spectrum of environmental resources/assets. The new duty applies to all development that takes place within an AONB and to all development which *"affects"* an AONB, irrespective of whether that development is EIA development or not. It is not tenable to argue that the duty simply does not apply to non-EIA development (which, by definition is development not likely to have significant effects). Nor is it tenable to argue that the duty applies to the (necessarily) non-significant effects of non-EIA development but only applies to the significant effects of EIA development.

53. It is SCC's position that the distinction in the EIA regime between significant and non-significant effects does not determine whether a development will *"affect"* an AONB and that this question remains a matter of planning judgment for the decision maker, having regard to the facts of the individual case, including any technical evidence presented on the effects of the development. SCC has already set out why it considers that the SLVIA shows that the development will have adverse effects on the special qualities of the SCHAONB and so *"affects"* the SCHAONB and engages the duty in s.85(A1) CROWA 2000.

Issue (c): a phasing requirement

54. The Opinion (at para 114(a)) invites the decision maker to reach some conclusions on the outcome of SCC's objections (and those of other parties) to a separate project (Norwich to Tilbury, or 'N2T') which is not yet the subject of a DCO application but when made will be considered by the same decision maker as the current Five Estuaries project. Clearly, it would be quite inappropriate for the decision maker to express any such conclusions or in any way to speculate on the outcome of that separate decision making process.

55. The Opinion also observes (at para 114(a)(iii)) that *"SCC does not appear to doubt"* the Applicant's submission that it would not incur the costs of investing in the project unless it was confident that the project would be connected to the Grid. That misunderstands SCC's position. SCC stated (in [REP4-048]) *"Whilst the Applicant also contends that such commercial considerations would make the phasing restriction unnecessary, the Applicant can only speak for itself and its current assessment of commercial considerations. Article 7 of the draft DCO allows the benefit of the DCO to be transferred to another party (subject to various conditions), Requirement 1 allows for a 7-year implementation period, and commercial perceptions, and the extent of 'confidence' needed to make investment decisions may change during the currency of the DCO."*

56. In [REP6-072] SCC also drew attention to the Borkum Riffgrund 3 offshore wind farm which was constructed before its (German) grid connection was available and was compensated for the delay in providing that connection, and SCC observed that the availability of compensation would have a bearing on any commercial assessment of the risks associated with an investment decision. SCC has not yet seen any information from the Applicant on the availability of compensation in the event that a Grid connection is not provided (either on time or at all).

57. SCC does not therefore accept the premise that underpins the reasoning in para 114(a) of the Opinion that it can be assumed that neither the Applicant, nor any other party to whom any made DCO is transferred, will

not commence construction of the project unless there is clarity that a Grid connection will be provided. Thus, SCC maintains its position that a phasing requirement is necessary.

58. As regards the question of reasonableness in terms of delay to commencement of the project (para 114(b) of the Opinion), SCC has reviewed [PD4-006] and [REP1-049], but neither document (which appear to duplicate each other) addresses a phasing condition but the separate question of whether consent for the Five Estuaries project should be delayed until a decision is made on N2T (in the Table on p.17). SCC is not aware that the Applicant has provided any demonstration as to why a phasing condition on the construction of one Work within a DCO consent (which Work is not expected to be commenced until Year 4 of the works programme) should delay the project's commencement or place it at a competitive disadvantage. SCC therefore does not accept that its phasing condition would be unreasonable.

59. As regards the question of precedent, SCC notes that in the proposed draft DCO for the Lower Thames Crossing, Work No.7A (being a 3.5 km length of the Lower Thames Crossing itself) is subject to a phasing restriction in Requirement 18 such that that Work cannot commence until the Secretary of State has approved a scheme for (as yet unknown) off-site highway works to a local authority junction, Orsett Cock (which is not part of the authorised works and not included in or authorised by that DCO). Whilst the circumstances are different, the principle of delaying a Work forming part of a Nationally Significant Infrastructure Project ("NSIP") by means of a phasing restriction until there is an authorised scheme to carry out some other necessary work not forming part of the project clearly has precedent. The most recent draft DCO for the Lower Thames Crossing can be accessed via this link: https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010032/TR010032-006561-National%20Highways%20-%20Consultation%208%20response%20-%20Development%20Consent%20Order%20v_19.0%20(Clean).pdf.

60. In terms of the drafting concerns about SCC's proposed requirement (in [REP4-049]) expressed in para 116 of the Opinion, SCC considers it is reasonable to apply a phasing restriction to a Work as a whole if that Work once constructed would be harmful to the SCHAONB (and so that harm would only be justified if it was clear that the Work would serve a purpose) but SCC would be willing to consider any revised wording that may be proposed to limit the restriction only to those parts of Work No.1 that were above sea-level (mean high water). As regards notification of the decision on N2T to the relevant planning authority, the key point is that no such notification could be given until there was a decision, and the restriction therefore serves a purpose. As regards the requirement for a timetable, this provides a mechanism to provide a reasonable assurance that both projects will proceed, and so also serves a purpose. There is no need for any further restriction to require the timetable to be followed.

61. SCC therefore maintains its position on the need for a phasing restriction.